SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1517

HELIX WATER DISTRICT,

Petitioner,

vs.

CAPITAN GRANDE BAND OF MISSION INDIANS,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

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No. .....

HELIX WATER DISTRICT,

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

INTRODUCTION.

Helix Water District (hereinafter Helix) respectfully petitions the United States Supreme Court for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit. The decision affirmed an Order of the United States District Court for the Southern District of California which had denied Helix' motion to dismiss damage claims brought by the Capitan Grande Band of Mission Indians (hereinafter Capitan Grande Band) for alleged trespasses which occurred from 1885 to 1935, on the ground that such claims were barred by the applicable California state statutes of limitations.

A. Opinions Below.

The Court of Appeals opinion is not yet reported. A copy of the opinion is printed in the Appendix to this petition, pages 1-21. The unreported District Court Memorandum and Amended Order is also printed in the Appendix, pages 22-39.

B. Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered March 14, 1975. On April 7, 1975, the Ninth Circuit issued an order staying the issuance of mandate pending the filing of a petition for certiorari on or before May 2, 1975. (A copy of this order is printed in the Appendix, p. 40.)

On April 29, 1975, the Ninth Circuit issued an order further staying mandate pending a petition for certiorari on or before June 2, 1975. (A copy of this order is also printed in the Appendix, p. 41.)

This petition was filed by June 2, 1975, and within 90 days of the entry of the judgment on March 14, 1975. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

C. Question Presented for Review.

Are California's statutes of limitations applicable to claims for money damages brought by a California Indian Band?

D. Statutes Involved.

This petition for certiorari involves the interpretation of the civil jurisdiction provisions of Public Law 83-280, the Act of August 15, 1953, 67 Stat. 588, which are codified in 28 U.S.C. §1360 (hereinafter P.L. 280). (28 U.S.C. §1360 is reprinted in the Appendix, pp. 42-43.)

The petition also involves the interpretation of the provisions of Public Law 89-505, the Act of July 18, 1966, 80 Stat. 304; as amended by Public Law 92-353, the Act of July 18, 1972, 86 Stat. 499; and Public Law 92-485, the Act of October 13, 1972, 86 Stat. 803, which are codified in 28 U.S.C. §2415 (hereinafter 28 U.S.C. §2415). (28 U.S.C. §2415 as amended is reprinted in the Appendix, pp. 44-47.)

E. Statement of the Case.

On July 17, 1972, the Capitan Grande Band,[1] basing jurisdiction upon 28 U.S.C. §§1331, 1362, 2201 and 2202, filed a complaint against Helix[2] in the United States District Court for the Southern District of California. (*Capitan Grande Band of Mission Indians v. Helix Irrigation District,* Civil No. 72-275-GT.) (R.O.A. 1-15.)

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[1]In their complaint, the Capitan Grande Band alleged that they are the duly-recognized governing body of the Capitan Grande Indian Reservation (R.O.A. 1.) The records of the Bureau of Indian Affairs office in Riverside, California, indicate that the Capitan Grande Indian Reservation consists of some 15,753.40 acres and *is uninhabited!* The Bureau of Indian Affairs' records also indicate that the Capitan Grande Band is composed of some 309 members, 156 of which live on the Barona Indian Reservation, 127 of which live on the Baron Long (sometimes referred to as the Viejas) Reservation, and that the remaining 26 members are listed as "off-reservation members" (see, Tribal Information Directory, July, 1974 edition).

[2]In 1913, the La Mesa, Lemon Grove and Spring Valley Irrigation District was formed to supply water to an area of San Diego County located just east of the City of San Diego. In 1956, this District changed its name to Helix Irrigation District. On March 7, 1973, Helix Irrigation District in turn changed its name to Helix Water District (see, California Water Code §20980.6). At present, Helix serves water to about 170,000 residents of San Diego County. Included within its boundaries are two cities (La Mesa and El Cajon) and at least six identifiable local unincorporated communities. Although originally formed to provide water for irrigation purposes, today over 95% of its water is utilized for domestic and municipal purposes.

The complaint sought both declaratory relief and money damages for alleged trespasses[3] committed by Helix and its predecessors[4] between 1885 and 1935 in the process of construction and maintenance of a flume and other water facilities on the Capitan Grande Indian Reservation.[5]

On December 1, 1972, Helix filed motions pursuant to Rule 12 of the Federal Rules of Civil Procedure

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[3]This claim is apparently based upon a theory raised for the first time in this complaint that various contracts and agreements between Helix' predecessors and the United States, which had granted them the right to construct and maintain water facilities on the Capitan Grande Reservation, were illegal and void. (R.O.A. 6.) *But see* January 16, 1888 contract between John W. Preston, U.S. Indian Agent on behalf of the United States, and the San Diego Flume Company (R.O.A. 21, Official Records, San Diego County, Deed Book 130, p. 277); August 20, 1892 agreement between the San Diego Flume Company and the United States, approved by the Secretary of the Interior, September 16, 1892. (R.O.A. 21, 45.)

In addition, the Band, also for the first time, sought a declaration that pursuant to the Act of January 12, 1891 (26 Stat. 712), and the Act of February 28, 1919 (40 Stat. 1206), as amended by the Act of May 4, 1932 (47 Stat. 146), Helix had a duty to supply water to the members of the Capitan Grande Band whether or not they resided on the Capitan Grande Indian Reservation. (R.O.A. 13.)

[4]The San Diego Flume Company which had entered into the 1888 and 1892 contracts went bankrupt in 1910, and its assets, including the water facilities, were purchased from its receivers by the Cuyamaca Water Company. (R.O.A. 21.) The Cuyamaca Water Company sold certain of its assets, including these facilities, to Helix in 1926. (R.O.A. 21.)

[5]The claim apparently ceased in 1935 because in that year the flume line and other facilities ceased to be utilized with the building of El Capitan Dam by the City of San Diego. (R.O.A. 21.) In 1934, the City of San Diego, pursuant to 40 Stat. 1206, as amended by 47 Stat. 146, had purchased portions of the Capitan Grande Reservation, including the property underlying the flume line, and related facilities from the United States and the Capitan Grande Band. (R.O.A. 21.) At approximately the same time, all of the then resident Indians moved to the nearby Baron Long and Barona Indian Reservations which the Indians and the United States had purchased with funds from the sale of their lands on the Capitan Grande Reservation. (R.O.A. 2, 21.)

seeking to dismiss the complaint on various grounds, including the ground that all damage claims were barred by applicable state statutes of limitations. (R.O.A. 16-17.)

On March 12, 1973, following extensive briefing and argument, the Honorable Gordon Thompson, Jr., District Judge, issued a memorandum and order denying Helix' motion to dismiss the complaint. (R.O.A. 159-176; see Appendix, pp. 22-39.)

On September 10, 1973, pursuant to Helix' request, Judge Thompson amended his order to allow an immediate appeal under 28 U.S.C. §1292(b) on the question of the applicability of statutes of limitations. (R.O.A. 175-176, Appendix, p. 39.) On October 11, 1973, the Ninth Circuit certified the appeal pursuant to the provisions of 28 U.S.C. §1292(b).

On March 14, 1975, the Ninth Circuit handed down the decision sought to be reviewed. In affirming the order of the District Court that the damage claims were not barred by the California statutes of limitations, Circuit Judge Sneed writing the majority opinion concluded that Congress in passing P.L. 280 had not intended to apply state statutes of limitations to suits by Indians for damages to their restricted property, that the proper limitations period was found in 28 U.S.C. §2415, and, therefore, the denial of the motion to dismiss should be affirmed. Judge Miller, while concurring in the result, disagreed with the majority's application of 28 U.S.C. §2415, and indicated that the lower court's decision should be affirmed because there was no applicable statute of limitations.

REASONS FOR GRANTING THE WRIT.

A. The Ninth Circuit Decision Is Inconsistent With Both the Legislative History of P.L. 280 and the Decisions of Other Courts.

In August, 1953, the enactment of P.L. 280 marked the culmination of years of Congressional investigation and debate concerning the need and advisability of transferring to California complete civil and criminal jurisdiction over all Indians located within its boundaries.[6] The transfer was approved as the result of

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[6]In 1949, Congress had granted California criminal and civil jurisdiction over the Agua Caliente Reservation (see Act of October 5, 1949, 63 Stat. 705). (See Appendix, p. 47.)

In 1950, Congress granted New York civil jurisdiction over all Indians within the State (Act of September 30, 1950, 64 Stat. 845, codified as 25 U.S.C. §233). (See Appendix, p. 48.)

During the next few years, bills were introduced at each session seeking a similar grant of jurisdiction to California. In 1952, extensive hearings were held on H.R. 3624, which would have granted California courts jurisdiction over Indians to the same extent those courts had jurisdiction in other civil actions and proceedings. (*Hearings on H.R. 459, H.R. 3235, and H.R. 3624 before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs on State Legal Jurisdiction in Indian Country*, 82d Cong., 2d Sess. (1952) (hereinafter *1952 Hearings*) at pages 28-29 (statements of Secretary of the Interior); page 31 (statement of Commissioner of Indian Affairs); pages 60-80 (testimony of Purl Willis, representing Mission Indians of California).) See also, H.Rep. No. 2161 on H.R. 3624, 82d Cong. 2d Sess. (1952) (hereinafter H.Rep. 2161) at page 3.

In January 1953, H.R. 1063, which ultimately became P.L. 280, was introduced (99 Cong. Rec. 140). Although originally aimed at giving jurisdiction only to California, it was later amended to add five other states, following hearings before the House Subcomm. on Indian Affairs, on June 19 and July 23, 1953. [Although not officially reported, Helix is informed that a typed transcript of these hearings was filed with the Supreme Court during the briefing of *Tonasket v. State of Washington* (1973) 411 U.S. 451. Helix has obtained a copy of this typed transcript and will hereinafter refer to the June 19, 1953, hearings as *1953 Hearings I*, and the July

specific findings that the Indians of California had reached such a stage of acculturation and development that extension to them of California laws would hasten their assimilation into the general populace of the state.[7]

Pursuant to the provisions of P.L. 280, all California laws which were "of general application"[8] were made applicable to the Indians excepting only those laws which authorized:

> ". . . the alienation, encumbrance or taxation of any real or personal property, including water rights, belonging to any Indian or Indian tribe, band or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with a federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the state to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein." (28 U.S.C. §1360(b).)

In apparently interpreting this proviso to prohibit the application of California statutes of limitations to

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23 hearings as *1953 Hearings II.*] See also, H.Rep. No. 848 on H.R. 1063, 83d Cong., 1st Sess. (1953) (hereinafter H.Rep. 848), adopted verbatim in S.Rep. No. 699 on H.R. 1063, 83d Cong., 1st Sess. (1953); 1953 U.S. Code Cong. and Ad. News, pages 2401 *et seq.*

[7]See *1953 Hearings I* pages 2-4 (statements of Chief Counsel of the Bureau of Indian Affairs); see also, H.Rep. 848, page 6.

[8]California statutes of limitations are clearly laws of general application. They apply not only in actions involving private persons, but also to actions by municipalities (*City of Los Angeles v. County of Los Angeles* (1937) 9 Cal.2d 624, 627) and even to actions by the State (California Code of Civil Procedure §345; *People ex rel. Dunn v. Melane* (1887) 73 Cal. 574).

the instant case because "trust or restricted property was involved" (Appendix, p. 5), the Ninth Circuit makes a fundamental error by ignoring the overwhelming weight of authority interpreting the proviso to prohibit only the application of those laws which impair the alienability of restricted property, such as a mortgage, lien or easement.[9] (See, *People v. Rhoades* (1970) 12 Cal.App.2d 720, 724, *cert. denied* (1971) 404 U.S. 823, holding that a provision of the California Public Resources Code which required the maintenance of a fire break around Indian buildings located in forest areas was not an illegal encumbrance; 56 Ops. Cal.Atty.Gen. 384, 386-87 (1973) ruling that P.L. 280 did not prohibit the application of Fish & Game provisions to non-Indian loggers on Indian lands; see also, *Rincon Band of Mission Indians v. County of San Diego* (1971 S.D.Cal.) 324 F.Supp. 371, 376, *reversed on other grounds* (1974 9th Cir.) 495 F.2d 1, *cert. denied* .... U.S. ...., 42 L.Ed.2d 283, holding that the County's gambling ordinance was applicable to Indian lands; *Agua Caliente Band of Mission Indians Tribal Council v. City of Palm Springs* (1972 C.D.Cal.) 347 F.Supp. 42, 51, *vacated by Ninth Circuit on other grounds* (January 24, 1975 unpublished order), which held that Palm Springs zoning regulations were applicable to Indian reservation lands; compare *Snohomish County v. Seattle Disposal Co.* (1967) 70 Wash.2d 668, *cert. denied* 389 U.S. 1016, *rehearing denied* 390

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[9]Enactment of P.L. 280 was considered to be part of a general program which would result in the eventual termination of all federal jurisdiction over California Indians. (H.Rep. 848, p. 3.) Thus, the addition of the proviso was considered to be only a temporary measure until the trust status was terminated and full state jurisdiction attached (*1952 Hearings* p. 34; H.Rep. 2161, p. 3; See also, the proviso of 63 Stat. 705 which had granted California jurisdiction over the Agua Caliente Reservation, Appendix p. 47).

U.S. 930, which held a zoning ordinance to be an encumbrance on Indian land, with the same Court's more recent decision in *Tonasket v. State of Washington* (1971) 79 Wash.2d 607, *vacated on other grounds* (1973) 411 U.S. 451, *on remand affirmed* (1974) 84 Wash.2d 164, *appeal dismissed* (1975) .... U.S. ...., 43 L.Ed.2d 387, which held a tax on the sale of cigarettes on Indian land was not an illegal encumbrance.)

Here, there is no alienation, encumbrance or taxation of any real or tangible personal restricted property. Even if the term "personal property" is somehow extended to include "Indian damage claims",[10] the answer is the same. Application of statutes of limitations does not take away the Indians' right to sue for damages (*Poafpybitty v. Skelly Oil Co.* (1968) 390 U.S. 365); it merely affects the available remedy. *Campbell v. City of Haverhill* (1895) 155 U.S. 610, 618.

Another reason the Ninth Circuit refused to construe P.L. 280 to be applicable apparently stemmed from its fear that such a construction would have barred the Indian claims in 1953 without giving them a reasonable period of time to commence the action before the bar took effect. (Appendix, pp. 5-6.) The problem with this approach is that, unlike the situation which may have prevailed in other areas, Indians in California, even before the passage of P.L. 280, had the right by themselves to take their grievances to the courts. (See, *Anderson v. Matthews* (1917) 174 Cal. 537 (California Indian right to vote upheld seven years before Congress made them citizens); *Piper v. Big*

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[10]In the statute of limitations governing actions brought by the United States, Congress specifically distinguished between claims for money damages and those involving rights to personal property. (See 28 U.S.C. §2415(a)-(c); Appendix pp. 44-45.)

Pines School District (1924) 193 Cal. 664 (Indians' right to attend public school upheld even if federal school is closer); *Acosta v. County of San Diego* (1954) 126 Cal.App.2d 455 (reservation Indians held entitled to county welfare); see generally, Goodrich, "The Legal Status of the California Indian" (1926) 14 Cal.L.Rev. 157.) In doing so, they were held subject to the same benefits and burdens as were other citizens. See *Francisco v. Industrial Accident Committee* (1923) 192 Cal. 635 (holding a reservation Indian was not entitled to any special privileges or exemptions because of his Indian status, and his claim was thus barred because not filed within six months of date of injury); *cf. Seneca Nation v. Christy* (1896) 162 U.S. 283 (suit brought in state court by Seneca Nation to recover possession of land taken and for damages in regard to an 1826 conveyance held subject to New York statutes of limitations.)

Thus, in light of the fact that even before the passage of P.L. 280, California Indians had *a full opportunity to try their rights in the courts;* the court's concern seems misplaced.[11]

By ruling that P.L. 280 has an *implied* exception to the application of state statutes of limitations to Indian damage claims, the Ninth Circuit opinion is also directly contrary to the decision of *Tonasket v. State of Washington* (1971) 79 Wash.2d 607, *vacated on other grounds* (1973) 411 U.S. 451, *affirmed on remand* (1974) 84 Wash.2d 164, *appeal dismissed* (1975) ..... U.S. ....., 43 L.Ed.2d 387, which concluded:

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[11]Congress was specifically made aware of these cases and the legal status of California Indians during the hearings which preceded the passage of P.L. 280. (See, *1952 Hearings*, pp. 69-71.)

> "We are convinced that, when Congress enacted Public Law No. 83-280, authorizing the states to assume jurisdiction over Indian tribes and their members, and providing that, after such assumption the civil laws of the state should apply to the Indians on the reservation the same as to others, *it intended that the only exceptions to the operation of those laws should be enumerated in the act.*" (79 Wash.2d at 619.) (Emphasis added.)[12]

Although on numerous occasions this Court has upheld legislation that singles out Indians for particular and special treatment (*Morton v. Mancari* (1974) .... U.S. ....., 41 L.Ed.2d 290, 303), the law is equally clear that in the absence of such legislation the Court is not free to create an exemption on its own. (See, *Barker v. Harvey* (1901) 181 U.S. 482, 492, the Court could not assume an exemption for Indians from the need to file their claims timely with the Federal Land Commission; *United States v. First National Bank of New York* (1914) 234 U.S. 245, 262, the Court could not assume that Chippewa Indians with less than "one-half white blood" were incompetent to convey land; *Oklahoma Tax Commission v. Texas Co.* (1949) 336 U.S. 342, 366, the Court could not assume an immunity from taxation for lessees of Indian land. *Cf., Federal Power Commission v. Tuscarora Indian Nation.* (1960) 362 U.S. 99, 116, a general statute in terms applying to all persons includes Indians and their property interests.)

In addition, unlike the statute conferring civil jurisdiction over Indians to New York (25 U.S.C. §233,

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[12]On remand the Washington Supreme Court, after considering the effects of both *McClanahan v. Arizona Tax Comm.* (1973)

(This footnote is continued on next page)

Appendix, pp. 48-49), which contained a specific proviso preserving Indian damage claims against the running of the State statutes of limitations,[13] no such proviso is contained in P.L. 280.

Helix submits that the failure to include a similar proviso in P.L. 280 was not due to Congressional inadvertence. When Congress has wanted to exempt Indians from statutes of limitations it has done so specifically (see, *e.g.*, 25 U.S.C. §70(a) waiving the statute of limitations for claims made against the United States by an Indian tribe, band or other identifiable group of American Indians); and thus the courts should not create an exemption which Congress did not intend. See, *Capoeman v. United States* (1971 Ct.Cl.) 440 F.2d 1002, 1007-1008, wherein the court ruled that in the

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411 U.S. 164 and recent state legislation, specifically reaffirmed its earlier opinion that P.L. 280 did not prohibit the application of state excise taxes to the sale of cigarettes by Indians on Indian land. Unfortunately the action of the Washington Court on remand and the apparent approval of its actions by this Court were not brought to the attention of the Ninth Circuit prior to its writing its opinion.

[13]25 U.S.C. §233 contains the following language:

> "Provided further, that nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York for making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952."

The background of this particular proviso appears in the Congressional debates which resulted in the passage of 25 U.S.C. §233. On August 14, 1950, Congressman Morris, who was one of the House managers of the bill, proposed as an amendment the above-mentioned language, explaining:

> "As it is now, the Indians, as we know, are wards of the Government and, therefore, the statute of limitations does not run against them as it does in the ordinary case. *This will preserve their rights so that the statute will not be running against them concerning those claims that might have arisen before the passage of this act.*" (96 Cong. Rec. 12460 (1960).)

absence of specific Congressional exemption, Indians were subject to the six-year limitation period of 28 US.C. §2501.[14]

In light of the above-mentioned legislative history of P.L. 280 and its interpretations by other courts, it is submitted that the Ninth Circuit erred in holding that P.L. 280 does not require the application of California statutes of limitations to the Indian claims which seek damages for alleged acts which took place up to 90 years ago.[15]

B. Neither the Legislative History nor the Federal Instrumentality Doctrine Supports the Application of 28 U.S.C. §2415 to These Indian Damage Claims.

While it is submitted that Judge Miller erred in concluding that no statute of limitations should be applicable, he aptly described the majority's erroneous use of 28 U.S.C. §2415 as follows:

> "Having been persuaded by legislative history in reaching its decision with respect to 28 U.S.C. 1360, the majority *declines to abide by the legislative history, not to mention the plain meaning of 28 U.S.C. 2415 and, instead, invokes the federal instrumentality doctrine used by this Court in decid-*

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[14]The oft-cited statement that statutes should be interpreted in the Indians' favor does not govern in this case because, unlike the latter modification of this statute in regard to other states (see, 25 U.S.C. §1322(a)), P.L. 280 did not require Indian consent for the imposition of California jurisdiction. (See generally, *Satherland, Statutes and Statutory Construction* (1974 4th Ed.) §64.03 n.15; *United States v. First National Bank* (1914) 234 U.S. 245, 259.)

[15]A hint at perhaps the real reason why the Court refused to apply P.L. 280 may be found in footnote 2 to its opinion which quotes a Law Review comment which *argues* that *in*

(This footnote is continued on next page)

ing two cases under the federal 'anti-injunction' statute (28 U.S.C. 1341.). Agua Caliente Band of Mission Indians v. County of Riverside, 442 F.2d 1184 (9th Cir. 1971), *cert. denied,* 405 U.S. 933 (1972); *Moses v. Kinnear,* 490 F.2d 21 (9th Cir. 1973)." (Appendix, pp. 14-15.) (Emphasis added.)

1. The Legislative History of 28 U.S.C. §2415 Clearly Indicates That Congress Did Not Intend It to Govern Damage Claims Brought by Indians.

In 1966, the intent of Congress in enacting 28 U.S.C. §2415 was for the first time to make statutes of limitations applicable to actions brought by the United States, and thus put the government on a parity with those private litigants who may sue. *Crown Coat Front Co. v. United States* (1967) 386 U.S. 503, 521 n.4; *Hearings on H.R. 13652 before Subcomm. No. 2 of the House Committee on the Judiciary,* 89th Cong., 2d Sess. (1966) at pages 9-10; H.Rep. No. 1534 on H.R. 13652, 89th Cong., 2d Sess. (1966) pages 3-4.

On July 18, 1972, the day on which the statute would have first barred an action by the United States for trespasses to Indian lands,[16] Congress enacted Pub-

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spite of what Congress originally intended P.L. 280 should be restrictively interpreted. (Appendix, p. 3 n.2.) In this same regard, one Court faced with a similar argument stated:

> "While Public Law 280 may no longer reflect the current or best policy, it should be noted that the propriety of P.L. 280 is for Congress and not for the Court to decide." (*Fond du Lac Band, Minnesota Chippewa Tribe v. Board of Supervisors* (D.C. Minn. Civil No. 5-74-6 filed June 10, 1974 [1 Ind.L.Rptr. No. 7, p. 42].)

[16]Pursuant to 28 U.S.C. §2415(g), the new statute did not apply to any action brought by the United States for alleged trespasses to Indian lands prior to six years after the date of its passage. (*Cf. United States v. Vibradamp Corporation* (1966 S.D.Cal.) 257 F.Supp. 931, 940.)

lic Law 92-353, 86 Stat. 499, which amended §2415 to extend the statutes of limitations for certain actions brought by the United States on behalf of Indian tribes until October 16, 1972. (See Appendix, p. 45.)

Thereafter, on July 31, 1972, the House Judiciary Committee issued a report recommending the passage of an additional five-year extension to §2415. H.Rep. No. 92-1267 on H.R. 13825, 92d Cong., 2d Sess. (1972). On September 12, 1972, hearings on the proposed five-year extension bill were held before the Senate Subcommittee on Indian Affairs. The first witness at those hearings was William A. Gershuny, the Associate Solicitor for Indian Affairs, representing the views of the Department of the Interior. In the course of his testimony he explained to the Subcommittee the reasons for the necessity of extending the limitation period for suits brought by the United States. He stated:

> "One of the reasons, Senator, why it's so essential that the suits be filed, that some claims be filed by the United States, is the possibility that *if the tribe itself in its own name filed a suit it would be subject to a shorter statute of limitations than would otherwise be applicable to the Federal Government.*" (*Hearings on S-3337 and H.R. 13825 before the Subcomm. on Indian Affairs of the Senate Committee on Interior and Insular Affairs,* 92d Cong., 2d Sess. (1972) at p. 19.) (Emphasis added.)

Attached as an appendix to the same hearings is a memo dated January 20, 1972, by Mr. Gershuny explaining to all regional solicitors and field solicitors the meaning and effect of §2415. In that memo, Mr. Gershuny wrote:

"The statute has no effect on the rights of individual Indians or tribes to sue the United States, but in such a suit the United States could assert defenses and counterclaims which would be barred if the United States were asserting the claims as plaintiff.

"*If individual Indians or a tribe were to institute litigation, they would be subject to the statute of limitations applicable to the general public except with respect to actions to quiet title to trust or restricted land.* (If the statute were permitted to run in such cases, it would conflict with federal statutes prohibiting alienation of Indian lands.)" (*Id.* at 45.) (Emphasis added.)

Finally, at the conclusion of his testimony, Mr. Gershuny was asked to comment on the suggestion by representatives of the Indian Legal Services that §2415 be amended to be applicable to actions brought by the Indians themselves. Mr. Gershuny replied:

"I have not seen that before but it would seem to me, Senator, *that their proposal is based on the erroneous assumption that §2415 is a statute of limitations, which would apply to the tribe itself if it filed its own suit.* We don't read §2415 that way. I have a lot of difficulty in understanding how §2415 could be applicable if the tribe itself filed suit. My first reaction, Senator, is that I think that the proposal is simply bottomed on a false assumption." (*Id.* at 23.) (Emphasis added.)

In light of this clear legislative history, not to mention the plain language of 28 U.S.C. §2415, which specifically states it is applicable only to actions *brought by the United States* (see Appendix, pp. 44-46) it is submitted that the Ninth Circuit erred in ruling that the Capitan Grande Band should get the benefit of the longer limitation periods set forth in that statute.

2. The Federal Instrumentality Doctrine Does Not Support the Extension to the Indians of the Benefits of 28 U.S.C. §2415.

The federal instrumentality doctrine is based upon the theory that if states were allowed to assess taxes against restricted Indian lands, the result would be to increase the expenses of the federal government in meeting its obligations to the Indians. *United States v. Rickert* (1903) 188 U.S. 432, 437-438; *Federal Indian Law* (1958 Ed.) p. 846.

Although there may be some question as to whether that doctrine has any application to a P.L. 280 state (*cf. Omaha Tribe of Indians v. Peters* (1974 D.Neb.) 382 F.Supp. 421), in *Agua Caliente Band of Mission Indians v. County of Riverside* (1971 9th Cir.) 442 F.2d 1184, 1186, *cert. denied* (1972) 405 U.S. 933, *rehearing denied* 405 U.S. 1033, *rehearing denied* 409 U.S. 901, and *Moses v. Kinnear* (1973 9th Cir.) 490 F.2d 21, 24-25, the Ninth Circuit extended this doctrine to uphold the right of Indians to bring suit to enjoin the imposition of state possessory interest and excise taxes despite the absence of the United States and despite the apparent jurisdictional bar of 28 U.S.C. §1341. Reasoning that since the United States could properly have been a co-plaintiff with the Indians and that 28 U.S.C. §1341 would not have barred the action by the United States, the Court held that it should not constitute a bar to an action by the Indians.

It is one thing to interpret the federal instrumentality doctrine to uphold the jurisdictional right of Indians to *sue* in the absence of the United States, a philosophy this Court approved in *Poafpybitty v. Skelly Oil Co.* (1968) 390 U.S. 365. It is quite another thing to extend to them the immunity of the United States from the

state statutes of limitations and give them the benefits of the longer statute of limitations set forth in 28 U.S.C. §2415.

Unlike the Capitan Grande Band, the United States does not represent only a single segment of society. It is presumed to act in the best interests of all people when it sues to enforce a public right.[17] As a result, it has historically been entrusted with the traditional, although diminishing (as shown by the passage of 28 U.S.C. §2415), rights of the sovereign to be free from the application of statutes of limitation whether it sues on its own behalf (*United States v. Summerlin* (1940) 310 U.S. 414, 416) or to protect restricted Indian property (*Board of County Commissioners of Jackson County v. United States* (1940) 308 U.S. 343, 351).

The historic distinction between the rights of the United States and the Indians is illustrated by the case of *Bryan County, Oklahoma v. United States* (1941 10th Cir.) 123 F.2d 782, wherein the Court, while noting that suits by individual Indians for tax refunds had been barred by state statutes of limitations, held the same statutes inapplicable to the United States because "the immunity of the sovereign from these defenses is historic." (*Id.* at 786.) Here, since the United States is not suing, state limitations should apply. (See, *Dillon v. Antler Land Co.* (1972 D. Mont.) 341 F. Supp. 734, 742, *affirmed* (1974 9th Cir.) 507 F.2d 940, *cert. filed* February 3, 1975, U.S. Docket No. 74-961.)

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[17]See *Federal Indian Law* (1958 Ed.), p. 2, pointing out that the United States is a trustee not only for the Indians but also for the rights of all citizens in the United States.

Conclusion—The Supreme Court Should Decide This Important Question of Federal Law.

Since ancient times (*cf.*, Deuteronomy 15:1, debts made uncollectable after seven years), civilized nations have recognized that claims which are valid are not usually allowed to remain neglected and that after the lapse of many years it becomes increasingly difficult to establish the truth because "evidence becomes lost, memories fade and witnesses disappear." (*Riddlesbarger v. Hartford Fire Insurance Co.* (1869) 74 U.S. (7 Wall.) 386, 390; *Burnett v. New York Central R. Co.* (1965) 380 U.S. 424, 428.)

It is urged by Helix that in light of the sound public policy disfavoring claims which seek damages for events occurring almost a century ago, this Court should grant this petition and vacate the Ninth Circuit ruling which creates a judicial exemption for Indians from state statutes of limitation.[18]

Dated: May 30, 1975.

Respectfully submitted,

PAUL D. ENGSTRAND,
DONALD R. LINCOLN,

Attorneys for Petitioner
Helix Water District.

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[18]The precedent created by this Ninth Circuit decision will have far-reaching effects. (See *Rincon Band of Mission Indians et al. v. Escondido Mutual Water Company, et al.*, U.S. Dist. Ct., S.D. Cal., No. 69-217-S; *Rincon Band et al. v. Vista Irrigation District*, U.S. Dist. Ct., S.D. Cal., No. 72-276-S, wherein the Indians seek damages of over $40,000,000 from each of the defendants for alleged trespasses dating from 1894. *Cf. Oneida Indian Nation v. County of Oneida* (1974) 414 U.S. 661. Although the Indians there challenged the legality of a 1795 cession of their lands, they sought damages only from May 1, 1968 through December 31, 1969.)

APPENDIX.

Opinion.

In the United States Court of Appeals for the Ninth Circuit.

Capitan Grande Band of Mission Indians, Appellee, v. Helix Irrigation District, Appellant. No. 73-2956.

Filed: March 14, 1975.

Appeal from the United States District Court, Southern District of California.

Before: BARNES and SNEED, Circuit Judges and MILLER* Judge, U.S. Court of Customs and Patent Appeals.

SNEED, Circuit Judge:

This is an appeal by the Helix Irrigation District from an interlocutory order denying its motion to dismiss the complaint of appellee Capitan Grande Band of Mission Indians on the ground that the action is barred by the California statutes of limitations. Upon denying the motion the district court authorized an appeal (on that issue only) pursuant to 28 U.S.C. §1292 (b) and this court certified the appeal.

In the district court suit, filed on July 17, 1972 pursuant to 28 U.S.C. §§1331 and 1362, the Band sought declaratory relief and money damages in trespass for alleged wrongs committed by Helix and its predecessors between 1885 and 1935 in the process of construction and maintenance of a waterworks facility on the Capitan Grande Indian Reservation. The land involved was held in trust by the United States until 1934 when it was conveyed by fee patent to the City of San Diego.

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*Honorable Jack R. Miller, United States Court of Customs and Patent Appeals, sitting by designation.

Appellant contends that the application of the California state statutes of limitations is compelled by the enactment by Congress in 1953 of Public Law 280, the civil jurisdiction provisions of which were codified as 28 U.S.C. §1360.[1] Appellee, on the other hand, contends that not only does this cause of action fall outside the scope of §1360 but that either there is no applicable statute of limitations, or, as a minimum, the applicable statute is 28 U.S.C. §2415, the general federal statute of limitations to which suits brought by the United States on behalf of the Indians are subject. We agree, for the reasons stated below, that the applicable statute of limitations is the one contained in §2415. Therefore, we affirm the district court's denial of the appellant's motion to dismiss the appellee's complaint.

I

An examination of the legislative history of P.L. 280 indicates that the measure had two coordinate aims: "First, withdrawal of Federal responsibility for Indian affairs wherever practicable; and second, termination of the subjection of Indians to Federal laws applicable

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[1]28 U.S.C. §1360(a) provides:

Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	Indian country affected
. . .	. . .
California	All Indian country within the State.
. . .	. . .

to Indians as such." H.R. Rep. No. 848, 83d Cong., 1st Sess. 3 (1953), adopted in S. Rep. No. 699, 83d Cong. 1st Sess. 3 (1953), 2 U.S. Code Cong. & Admin. News 2409 (1953).[2] The report also stated that

> [T]he Indians of several states have reached a stage of acculturation and development that makes desirable extension of State civil jurisdiction to the Indian country within their borders. Permitting the

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[2]According to one author, the heyday of the "termination theory" is over:

> [A]lthough an interpretation [of P.L. 280] finding a broad grant of power to the states might be consistent with the original national policy behind the act, such a reading is inconsistent with more modern approaches to the problem. The trend of modern thinking appears to be away from a complete termination approach and more toward the principles of the 1934 [Reorganization] act. In a speech delivered to Congress on July 8, 1970, President Nixon unilaterally declared a change in governmental policy concerning Indian affairs which he encouraged Congress to follow. In that speech, the President declared: "Self-determination among Indian people can and must be encouraged without the threat of eventual termination. The trend of judicial thinking likewise appears to be in favor of preserving the unique legal status of Indians despite frequent efforts of state and local governments to assume control.
>
> In short, the termination philosophy which originally aided the passage of P.L. 280 is to some extent an anachronism. Given the fact that much of current governmental policy is aimed at fostering the economic independence of Indian tribes and promoting tribal self-government, interpreting P.L. 280 in such a way as to decrease Indian autonomy only serves to render governmental policy inconsistent.
>
> Therefore, although the act was originally grounded in termination theory, that theory has been sufficiently dissipated by recent developments that it ought not to govern the act.

Comment, *State Jurisdiction Over Indian Land Use: An Interpretation of the "Encumbrance" Savings Clause of Public Law 280*, 9 Land and Water L. Rev. 421, 428-29 (1974). (Footnotes omitted).

> State courts to adjudicate civil controversies arising on Indian reservations, and to extend to those reservations the substantive civil laws of the respective States *insofar as those laws are of general application to private persons or private property,* is deemed desirable.

H.R. Rep. No. 848 at 6, S. Rep. No. 699 at 5, 2 U.S. Code Cong. & Admin. News at 2412. (emphasis added).

The emphasis upon laws "of general application to private persons or private property" is significant. While by the terms of P.L. 280 Congress, inter alia, may have "intended to grant to the state the full exercise of police power,"[3] and thus the ability to enforce, e.g., zoning ordinances[4] or gambling ordinances[5], and to apply its statutes of limitations to ordinary commercial transactions "between Indians or to which Indians are parties," it is not at all clear that Congress meant for a state statute of limitations to apply in a lawsuit initiated by an Indian band against a third party for damages to its property interests held in trust by the United States for the benefit of the band.[6] Indeed, according to above-

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[3]Agua Caliente Band of Mission Indians' Tribal Council v. City of Palm Springs, 347 F.Supp. 42, 49 (C.D. Cal. 1972), *vacated and remanded* by this court in an unpublished order, January 24, 1975.

[4]*Id.* at 51.

[5]Rincon Band of Mission Indians v. County of San Diego, 324 F.Supp. 371 (S.D. Cal. 1971), *rev'd on other grounds,* 495 F.2d 1 (9th Cir. 1974), *cert. denied,* 43 USLW 3281 (Nov. 11, 1974).

[6]Our recent decision in Dillon v. Antler Land Co., 507 F.2d 940 (9th Cir. 1974), *aff'g.* 341 F.Supp. 734 (D. Mont. 1972), is distinguishable in that it involved the application of the Montana statutes of limitations to land owned by an Indian in fee simple, which had lost its character as a trust property interest entitled to federal protection.

quoted House Report on P.L. 280, "[P]rovision was made for permitting the California State courts to adjudicate civil controversies of any nature affecting Indians within the State, *except where trust or restricted property was involved.*" H.R. Rep. No. 848 at 5, S. Rep. No. 699 at 5, U.S. Code Cong. & Admin. News, at 2411. (Emphasis added).

We also note the effect of the construction of P.L. 280 urged by appellant. To apply the California statutes of limitations without qualification would bar appellee's suit even if it had been filed on the date that P.L. 280 became law. Such a result would be discordant with the Supreme Court's view that the constitutionality of statutes of limitations depends upon whether "a reasonable time is given for the commencement of an action before the bar takes effect." *Terry v. Anderson,* 95 U.S. 628, 632-33 (1877). Elaborating on this proposition in a subsequent decision, the Court explained:

> [A]ll statutes of limitations must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions. It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action. . . .

Wilson v. Iseminger, 185 U.S. 55, 62 (1902).

Thus had Congress intended to bar claims such as the appellee's with respect to trust property it must be pre-

sumed that it would have preserved them for some "reasonable" period after the promulgation of P.L. 280. It might have, for example, taken the approach of 28 U.S.C. §2415(g), *see infra,* and provided that any cause of action with respect to such property arising prior to the date the measure was enacted would be deemed to have accrued upon that date. This failure to preserve such claims in any manner provides strong reason for interpreting P.L. 280 in a manner that does not suggest constitutional difficulties. This is accomplished by our holding that P.L. 280 does not require the application of the California statutes of limitations to the claims set forth in the complaint of the Capitan Grande Band of Mission Indians involving redress for rights in Indian trust lands and property.

II

Given that the California statutes of limitations are not applicable in the case at bar, we agree with appellee that the proper limitations period is to be found in 28 U.S.C. §2415.[7]

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[7]28 U.S.C. §2415, in relevant part, provides:

(a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later: *Provided,* That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment: *Provided, further,* That an action for money damages brought by the United States for or on behalf of a recognized tribe, band or group of American Indians shall not be barred unless the complaint is filed more than six years and ninety days after the right of

In 28 U.S.C. §§2415 and 2416 Congress for the first time established a general statute of limitations on tort and contract actions brought by the United States on its own behalf and in carrying out its trust responsibilities toward the Indians. Originally enacted on July 18, 1966 and amended during a ninety-day extension

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action accrued: *Provided further,* That an action for money damages which accrued on the date of enactment of this Act in accordance with subsection (g) brought by the United States for or on behalf of a recognized tribe, band, or group of American Indians, or on behalf of an individual Indian whose land is held in trust or restricted status, shall not be barred unless the complaint is filed more than eleven years after the right of action accrued or more than two years after a final decision has been rendered in applicable administrative proceedings required by contract or by law, whichever is later.

(b) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues: *Provided,* That an action to recover damages resulting from a trespass on lands of the United States; an action to recover damages resulting from fire to such lands; an action to recover for diversion of money paid under a grant program; and an action for conversion of property of the United States may be brought within six years after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band or group of American Indians, including actions relating to allotted trust or restricted Indian lands, may be brought within six years and ninety days after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band, or group of American Indians, including actions relating to allotted trust or restricted Indian lands, or on behalf of an individual Indian whose land is held in trust or restricted status which accrued on the date of enactment of this Act in accordance with subsection (g) may be brought within eleven years after the right of action accrues.

. . .

(g) Any right of action subject to the provisions of this section which accrued prior to the date of enactment of this Act shall, for purposes of this section, be deemed to have accrued on the date of enactment of this Act.

period in 1972, §2415 now directs as follows: Causes of action governed by the section which arose prior to July 18, 1966, are deemed to have accrued on that date. All claims brought by the United States for damages for trespass to Indian lands accruing on July 18, 1966, must be filed within eleven years of that date and all subsequently-arising claims are subject to a six year and ninety-day limitations period.

The legislative history of §2415 demonstrates a concern for the preservation of the type of claim involved here, i.e., a cause of action for an historic trespass to Indian land.[8] On the other hand, there is nothing in the history to indicate that Congress meant for the provisions of §2415 to apply to a suit filed by an Indian Band on its own behalf, and one Interior Depart-

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[8]According to a Department of Interior report to the Senate in support of the 1972 extension of the limitations period:

> Indians are quite concerned that the present statutory limitation might bar them from recovering damages for many wrongs they have suffered. The Bureau of Indian Affairs and the Solicitor's Office of this Department have not been able to perform the necessary work to identify all of these wrongs and then develop the factual information necessary to get litigation filed. Even with the help of attorneys employed by the various tribes, there are, no doubt, many causes of action which have not been identified. This inability to prosecute the present claims of Indians will work a hardship on tribes all over the country and may result in a considerable loss to Indians through no fault of their own, losses which Indians can ill afford because of their low position on the economic scale.
>
> We believe it is particularly important not to let these unidentified claims lapse because we are on the verge of making substantial progress in discharging our trust responsibilities with regard to Indian resources. . . . It would be most unfortunate for many Indian claims to be barred by the statute of limitations at a time when the means for discovering and prosecuting such claims are in the process of being markedly improved. S. Rep. No. 92-1253, 92nd Cong., 2d Sess. 4-5 (1972).

ment official testified otherwise.[9] However, although an examination of the legislative history does not compel our conclusion, we agree with the decision of the court below that appellee should benefit from the provisions of §2415.

It is clear that if the United States had been the plaintiff here, suing on behalf of the Capitan Grande Band, the applicable limitations period would be the one in §2415. It is also settled that Indians may sue on their own behalf with respect to property interests held in trust for them by the United States, even though the United States could have sued independently. *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968); *Fort*

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[9]See the following excerpts from the testimony of William A. Gershuny, Associate Solicitor for Indian Affairs, Department of the Interior, at the Senate hearings on the 1972 amendment:

> Mr. Gershuny. One of the reasons, Senator [Anderson], why it's so essential that the suits be filed, that some claims be filed by the United States, is the possibility that if the tribe in its own name files the suit it would be subject to a shorter statute of limitations than would otherwise be applicable to the Federal Government.
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> . . .
>
> Senator Fannin. . . . The legal services suggest that the words 'United States for or on behalf of' be stricken, on the theory that should a cause of action be extended that they could bring action on their own. Would you comment on this suggestion?
>
> Mr. Gershuny. I have not seen that before, but it would seem to me, Senator, that their proposal is based on the erroneous assumption that section 2415 is a statute of limitations which would apply to the tribe itself if it filed its own suit.
>
> We don't read section 2415 that way. I have a lot of difficulty in understanding how section 2415 could be applicable if the tribe itself filed suit.
>
> My first reaction, Senator, is that I think that that proposal is simply bottomed on a false assumption.

Hearings on S. 3377 and H.R. 13825 Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs, 92nd Cong., 2d Sess. 19, 23 (1972).

Mojave Tribe v. Lafollette, 478 F.2d 1016 (9th Cir. 1973); *Skokomish Indian Tribe v. France,* 269 F.2d 555 (9th Cir. 1959). Moreover, an Indian band cannot compel the United States to sue on its behalf in such suits. *Rincon Band of Mission Indians v. Escondido Mut. Water Co.,* 459 F.2d 1082 (9th Cir. 1972).

Indian bands and tribes have no assurance that all their claims, or even all their plainly reasonable claims, with respect to trust lands will be pursued in a timely fashion by the United States. Such assurance is precluded by the magnitude of the administrative burdens imposed on the United States by reason of its fiduciary responsibilities, and the inherently discretionary manner in which these responsibilties must be discharged. To provide such assurance would be sustantially illusory were such suits barred by state statutes of limitations more restrictive than that to which the United States would have been subject had it brought the suit.

Viewed against this backdrop, we adopt with approval the approach of the lower court in its application of the principles we set out in *Agua Caliente Band of Mission Indians v. County of Riverside,* 442 F.2d 1184 (9th Cir. 1971), *cert. denied,* 405 U.S. 901 (1972). In that case, the plaintiff Indian band was contesting the imposition of a California state possessory interest tax on the lessees of Indian land. Before reaching the merits, this court was confronted with the question of the applicability of the federal "anti-injunction" statute, 28 U.S.C. §1341, which provides that where a "plain, speedy and efficient remedy" is available in state court the federal courts shall not enjoin the assessment, levy, or collection of any tax under state

law. In holding that the plaintiff Indian band could pursue its case in federal court in the face of §1341, we explained:

> An Indian, as the beneficial owner of lands held by the United States in trust has a right acting independently of the United States to sue to protect his property interests. The reasons given in *United States v. Livingston,* [179 F.Supp. 9 (E.D. S.C. 1959), *affirmed without opinion,* 364 U.S. 281 (1960)] for exempting instrumentalities of the United States from the operation of 28 U.S.C. Section 1341 are no less cogent when the right to the exemption is asserted by one who properly could be a co-plaintiff of the United States. *Id.* at 1186.

Analogizing from the treatment of §1341 by the *Agua Caliente* court, the court below concluded:

> In the instant case as well the plaintiff may sue to protect its properly interests independently of the United States. And a fair reading of 28 U.S.C. §2415(b) indicates a clear Congressional intent to preserve the vitality of actions for trespass to Indian trust lands and conversion of Indian trust property where the plaintiff is the United States. Applying the rationale of *Agua Caliente* the Court must therefore agree that since the interests sought to be protected by Congress are the same, no matter who the plaintiff may be, the benefits of §2415 should extend to the present plaintiff in this limited area involving redress for rights in Indian trust lands and property. (R. 170-71).

In a subsequent decision dealing with §1341 we followed *Agua Caliente* and permitted an individual In-

dian and a tribe to proceed in federal court on the ground that they were within the instrumentality doctrine's exception to the jurisdictional bar of §1341. *Moses v. Kinnear,* 490 F.2d 21, 25 (9th Cir. 1973). We pointed out that the federal instrumentality doctrine applies "where the United States is not a party plaintiff, if the suit could have been brought by the United States and is in fact brought by parties who could properly be co-plaintiffs with the United States. [Citing *Agua Caliente.*]" The plaintiffs in *Moses v. Kinnear* we held were such parties.

III.

In approving the foregoing reasoning of the trial court, we also wish to indicate our approval of the trial court's express refusal to accept one of appellee's contentions *viz.*, that the legislative history of 28 U.S.C. §1362[10] somehow should be read into §2415 so as to exempt the Indians from the state statutes of limitations. This contention rests upon legislative history that indicates that Congress sought in 28 U.S.C. §1362 to

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[10]28 U.S.C. §1362 provides:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

With the enactment of §1362, "arising under" claims brought by Indian groups were no longer subject to a $10,000 amount in controversy prerequisite to federal court jurisdiction. The district court in this case held that the invocation of §1362 does not dispense with the requirement of properly pleading a federal question.

assure the "same judicial determination whether the action is brought on their behalf by the Government or by their [the tribes'] own attorneys."[11] We agree with the trial court that this legislative history should not be used to expand the scope of another measure. The trial court is correct when it said:

> [S]uch an interpretation [is] unwarranted, where there has been no showing that both . . . 28 U.S.C. §2415 and . . . 28 U.S.C. §1362 were considered by Congress either simultaneously or in light of one another. Congress was clearly addressing different problems in the two statutes and therefore its comments in the one instance are not necessarily applicable in the other. (R. 169).

The order denying the motion to dismiss the complaint on the ground that the action is barred by the California statutes of limitations is

AFFIRMED.

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[11]According to the report of the House Judiciary Committee: The United States as trustee can initiate litigation involving issues identical to those which would be presented in cases brought under the new section. The enactment of this bill would provide for U.S. district court jurisdiction in those cases where the U.S. attorney declines to bring an action and the tribe elects to bring the action. As is observed in the Department of the Interior report, the tribes would then have access to the Federal courts through their own attorneys. It can therefore be seen that the bill provides the means whereby the tribes are assured of the same judicial determination whether the action is brought in their behalf by the Government or by their own attorneys. Rep. No. 2040, 89th Cong., 2d Sess. 23 (1966), 2 U.S. Code Cong. & Admin News 3147 (1966).

MILLER, Judge, concurring:

I agree with the result reached in the majority opinion on the basis of the persuasive analysis of P.L. 280 (28 U.S.C. 1360) and determination that it does not apply to controversies such as the instant case, involving, as it does, "trust or restricted property."

Such being the case, the lower court's decision must be affirmed, either because appellee's action is not barred under 28 U.S.C. 2415 or, as alternatively contended by appellee, because there is no applicable statute of limitations. Accordingly, it is unnecessary to decide whether 28 U.S.C. 2415 is applicable.

However, the majority unnecessarily takes up the question of the applicability of 28 U.S.C. 2415 and then, erroneously in my judgment, decides that it is applicable. Having been persuaded by legislative history in reaching its decision with respect to 28 U.S.C. 1360, the majority declines to abide by the legislative history, not to mention the plain meaning, of 28 U.S.C. 2415 and, instead, invokes the federal instrumentality doctrine used by this court in deciding two cases under the federal "anti-injunction" statute (28 U.S.C. 1341). *Agua Caliente Band of Mission Indians v. County of Riverside,* 442 F.2d 1184 (9th Cir. 1971), *cert. denied,* 405 U.S. 933 (1972); *Moses v. Kinnear,* 490 F.2d 21 (9th Cir. 1973).

In *Moses v. Kinnear, supra,* this court held that the federal instrumentality doctrine applies where the

United States is not a party plaintiff, if the suit (to enjoin imposition of state excise taxes) could have been brought by the United States and is in fact brought by parties who could properly be co-plaintiffs with the United States, citing *Agua Caliente, supra.* In the latter case, this court held that an Indian, as the beneficial owner of lands held by the United States in trust, had a right acting independently of the United States to sue (to enjoin imposition of a state possessory interest tax) to protect his property interests, citing *Poafpybitty v. Skelly Oil Co.,* 390 U.S. 365 (1968). The court quoted from Federal Indian Law, Dept. of Int., 1958, page 846, that the federal instrumentality doctrine in its application to Indians and Indian property—

> is founded upon the premise that the power and duty of governing and protecting tribal Indians is primarily a Federal function, and that a State cannot impose a tax which will substantially impede or burden the functioning of the Federal Government.

In *Poafpybitty, supra,* the Supreme Court held that Indian lessors under 25 U.S.C. 396 (of an oil and gas lease of allotted land held under trust patents issued by the United States) had standing to sue upon a violation of the lease; and it said (at 374) that "the Indian's right to sue should not depend on the good judgment or zeal of a government attorney." In considering the General Allotment Act of 1887 (25 U.S.C. 331-58) and the restrictions on the Indian's control of land

under regulations of the Interior Department, the Court stated (at 368-69):

> In our view, these restrictions on the Indian's control of his land are mere incidents of the promises made by the United States in various treaties to protect Indian land and have no effect on the Indian's capacity to institute the court action necessary to protect his property. In order to fulfill these national promises to safeguard Indian land and at the same time "to prepare the Indians to take their place as independent, qualified members of the modern body politic," *Board of County Comm'rs v. Seber,* 318 U.S. 705, 715 (1943), the allotment system was created with the Indians receiving ownership rights in the land while the United States retained the power to scrutinize the various transactions by which the Indian might be separated from that property. . . . This dual purpose of the allotment system would be frustrated unless both the Indian and the United States were empowered to seek judicial relief to protect the allotment. . . . In *Heckman* [*Heckman v. United States,* 224 U.S. 413 (1912)], an action brought by the United States to set aside an improper conveyance of restricted land, this Court realized that the allotment system created interests in both the Indian and the United States. "A transfer of the allotments is not simply a violation of the proprietary rights of the Indian. It violates the governmental rights of the United States." [Footnote omitted.]

Thus, in the above cases, it is seen that the federal instrumentality doctrine was applied in the absence of

any indication by Congress to the contrary, to *aid* Indians in the protection of their property rights.

What the majority does here, instead, is apply the federal instrumentality doctrine to *hinder* Indians in the protection of their "trust or restricted property" rights by subjecting their judicial remedies to the periods of limitation imposed by 28 U.S.C. 2415, in the absence of any indication by Congress that this was intended and in the face of legislative history completely to the contrary.

As shown in footnote 9 of the majority opinion, the Associate Solicitor for Indian Affairs, Department of the Interior (which recommended the amendments), at the Senate hearings on the 1972 amendments to 28 U.S.C. 2415, stated that it was an "erroneous assumption" that section 2415 is a statute of limitations which would apply to the tribe itself if it filed its own suit. "We don't read section 2415 that way," he said. This is not surprising. The bill (H.R. 13652), which became P.L. 89-505 in 1966 and added section 2415, was introduced as a bill "to establish a statute of limitations for certain actions brought by the Government." 112 Cong. Rec. 5884 (1966). It was so described before passage by the House of Representatives. *Id.* at 12262. Prior to passage in the Senate, the manager of the bill, Senator Ervin stated (*Id.* at 14378):

> Mr. President, under existing law the Federal Government is not subject to any statute of limitations, unless there is a special statute so providing in specific instances.
>
> H.R. 13652 would establish statutes of limitations for certain types of actions brought by the Government.

The report on the bill from the Senate Committee on the Judiciary summed up the reason for the bill as follows (2 U.S. Code Cong. & Admin. News 2509 (1966)):

> In recommending this legislation, the committee feels that it will provide a greater fairness as regards private individuals who deal with the Government while adequately providing for the interests of the Government. The Government will be barred from asserting old and stale claims in the courts and the necessity for the early assertion of claims will require increased efficiency in Government claims proceedings.

The amendments with which this case is concerned were added in 1972 by P.L. 92-485. The bill (H.R. 13825) was introduced as a bill "to extend the time for commencing actions on behalf of an Indian tribe, band, or group." 118 Cong. Rec. 8553 (1972). It was so described as reported to the Senate, *Id.* at 33048, and as passed on the consent calendar in the Senate. *Id.* at 34437. The report on the bill from the Senate Committee on Interior and Insular Affairs (S. Rep. No. 92-1253) contained the following statement (2 U.S. Code Cong. & Admin. News 3593 (1972):

> The Interior Department in its report on the legislation . . . further stated in its report that—
>
> > the Bureau of Indian Affairs and the Solicitor's office of the Department have not been able to perform the necessary work to identify all of these wrongs and then develop factual information necessary to get litigation filed.

Prior to passage by the House, the manager of the bill, Mr. Danielson, stated (118 Cong. Rec. 28116-17 (1972)):

> Mr. Speaker, the enactment of the bill H.R. 13825, as amended by the committee, is necessary to make sure that the U.S. Government will have adequate time to identify, prepare, and file certain actions in behalf of Indians. The actions covered by the committee amendment are those which occurred prior to the enactment of a law on July 18, 1966, which for the first time limited the time for actions brought in behalf of Indians by the United States against third parties.
>
> Section 2415 of title 28 of the United States Code as added to that title by the act of July 18, 1966, imposed a statute of limitations on tort or contract suits brought by the United States on its own behalf and in carrying out its trust responsibilities to Indians. . . .
>
> The Interior Department advised the committee that the situation concerning these actions is such that Indians are concerned that the present statutory limitation might bar them from recovering damages for many wrongs they have suffered. The committee has received correspondence from Indian groups expressing this concern over the situation. The Department further stated in its report that the Bureau of Indian Affairs and the Solicitor's Office of the Department have not been able to perform the necessary work to identify all of these wrongs and then develop factual information necessary to get litigation filed. Even

with the help of attorneys employed by the various tribes, there are, no doubt, many causes of action which have not been identified. This inability to prosecute the present claims of Indians will work a hardship on tribes all over the country and may result in a considerable loss to Indians through no fault of their own, losses which Indians can ill afford because of their low position on the economic scale. This situation clearly requires enactment of the extension provided in the substitute language proposed by the Department of the Interior. In commenting on the need for the legislation, the Department noted that it is now in position to take effective action in discovering and prosecuting these claims. . . .

. . . .

As has been stated in the report, the potential claims which would be affected by the amendments of this bill are those which have not been identified. Since these are actions which would be filed by the United States in behalf of Indians, it would, of course be necessary for the Government to develop the factual information in connection with each matter before filing the action.

It is further to be noted that section 2415 appears under Chapter 161 of the United States Code, which is entitled: "UNITED STATES AS PARTY GENERALLY." 1970 United States Code (Supp. II, 1972) at 751. The section itself is shown (at 752) as follows: "§ 2415. Time for commencing actions brought by the United States."

Finally, the majority opinion cites *Fort Mojave Tribe v. Lafollette*, 478 F.2d 1016 (9th Cir. 1973)[1] in support of the proposition that Indians may sue on their own behalf with respect to property interests held in trust for them by the United States, even though the United States could have sued independently. That proposition, in absence of a contrary intent by Congress, is well established by *Poafpybitty, supra*. However, the holding in *Fort Mojave Tribe, supra*, was premised on a conclusion that Congress intended 28 U.S.C. 1362 to authorize an Indian tribe to bring suit in federal court to protect its federally derived property rights in those situations where the United States declines to act. Here the majority opinion indicates its approval of the trial court's *express refusal* to accept appellee's contention that the legislative history of that statute should be read into 28 U.S.C. 2415 because, as the trial court said:

> there has been no showing that both . . . 28 U.S.C. § 2415 and . . . 28 U.S.C. § 1362 were considered by Congress either simultaneously or in light of one another. Congress was clearly addressing different problems in the two statutes and therefore its comments in the one instance are not necessarily applicable to the other.

In view of the foregoing, I conclude that 28 U.S.C. 2415 does not apply to the instant case.

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[1]Also cited is *Skokomish Indian Tribe v. France*, 269 F.2d 555 (9th Cir. 1959), which involved an executive order based on a treaty.

Memorandum and Amended Order.

United States District Court, Southern District of California.

Capitan Grande Band of Mission Indians, Plaintiff, v. Helix Irrigation District, Defendant. Civil No. 72-275-GT.

Filed: Sept. 10, 1973.

The above entitled cause came before the Court on March 12, 1973, on defendant's motions to dismiss, to strike certain allegations of the complaint and for a more definite statement. After lengthy argument by counsel for both parties, the Court took the matter under submission to consider the extensive briefs and arguments presented to it. This now having been done, the Court herein proceeds to the following discussion and ruling on defendant's motions.

I

SUBJECT MATTER JURISDICTION

Defendant's first attack on the complaint raises the question whether the Court has subject matter jurisdiction over the action under 28 U.S.C. §1331 (federal question jurisdiction), 28 U.S.C. §1362, or a combination of the two. It is well settled that 28 U.S.C. §§2201 and 2202 are not jurisdiction-conferring statutes, but merely create an additional remedy where the District Court already has jurisdiction to entertain the action. *Wells v. United States*, 280 F.2d 275 (9th Cir. 1960).

Defendant contends that the complaint is essentially one for damages for trespass, which does not contain any necessary allegation that the Constitution, laws or treaties of the United States must be interpreted to establish the plaintiff's right to relief. The defendant

urges that this Court adopt the rationale of the majority opinion in *Oneida Indian Nation of New York State v. County of Oneida, N.Y.*, 464 F.2d 916 (2d Cir. 1972), *review granted*, 41 L.W. 3633 (1973), wherein Judge Friendly found that 28 U.S.C. §1362 merely eliminated the jurisdictional amount of §1331, where an Indian tribe was the plaintiff. *Id.* at 919, n.4. He concluded, therefore, that the same strict rules of pleading applied in §1362 as in §1331 in establishing that plaintiff's cause of action arose under the Constitution, laws, or treaties of the United States. The jurist applied the following general rule:

> " 'Under existing law it is well established that federal question jurisdiction is present only if the reliance on a federal right appears on the face of the well-pleaded complaint. The first Supreme Court decision to construe the Acts of 1875 [creating general federal question jurisdiction] applied such a rule, citing Chitty to determine what allegations were proper, *Gold-Washing & Water Co. v. Keyes*, 96 U.S. 199 (1877), and the rule has been insisted upon ever since.' ALI Study of the Division of Jurisdiction between State and Federal Courts, Commentary on §1331, p. 169 (1969). One effect of the rule is to bar 'access to federal court on the basis of allegations which are not required by nice pleading rules,' *Id.* at 169-170, notably in cases involving rights to land." 464 F. 2d at 920.

Oneida was a suit in ejectment, which the Indian Tribe claimed was unlawful due to a violation of a federal treaty. The majority found, however, that the case of

Taylor v. Anderson, 234 U.S. 74 (1914), was directly on point in holding that in such an action:

> "all that *needed* to be alleged was 'that the plaintiffs were owners in fee and entitled to the possession; that the defendants had forcibly taken possession and were wrongfully keeping the plaintiffs out of possession, and that the latter were damaged thereby in a sum named.' " 464 F.2d at 920.

Judge Friendly further quoted from *Taylor v. Anderson, supra,* as follows:

> "Jurisdiction 'must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose.' " 464 F.2d at 921 (emphasis in original).

Under California law it is sufficient in an action for trespass or ejectment to allege "only [plaintiff's] ownership or actual possession," and such an allegation is good against a demurrer, requiring the defendant "to set up ownership in itself as a defense." *Shusett, Inc. v. Home Savings and Loan Association,* 231 Cal.App. 2d 146, 150, 41 Cal.Rptr. 622 (1964). Thus, if the "well-pleaded complaint" rule of the *Oneida* majority is applied, plaintiff has failed to establish federal jurisdiction under either §1331 or §1362 of Title 28.

Plaintiff urges this Court, however, to read 28 U.S.C. §1362 as providing a broader branch of jurisdiction than §1331. Admittedly, such a construction has been imposed upon §1362 by Circuit Judge Lumbard in his

dissent in the *Oneida* case, and adopted by District Judge Murray of Arizona in *Salt River Pima-Maricopa Indian Community v. Arizona Sand and Rock Co.*, 353 F.Supp. 1098 (1972). Judge Lumbard's interpretation of the legislative history accompanying §1362 leads him to conclude that, by this statute, Congress intended to provide:

> "a forum to which [the Indians] could go themselves when government departments and agencies declined to represent them." 464 F.2d at 924 (Lumbard, J. dissenting).

Additionally, District Judge Murray reads House Report No. 2040 accompanying S.1356 (28 U.S.C. §1362) to indicate:

> "that in addition to removing the $10,000 jurisdictional requirement of 28 U.S.C. §1331 the effect of the bill would be to provide the means whereby the tribes are assured of the same judicial determination whenever the government chooses not to exercise its discretion and declines to bring the action. U.S.C.C. & A.N. 1966, p. 3147." 353 F.Supp. at 1100.

This Court is not convinced the §1362 was meant to so broaden the jurisdiction of the District Courts. Such an interpretation would arguably allow the Indian tribes to completely ignore the requirements of establishing a federal question as currently understood. Reading §1362 to mean that "any case which might have been brought by the United States is deemed to be one arising under the Constitution, laws or treaties of the United States if it is brought on behalf of an Indian tribe by their own attorneys," 353 F.Supp. at 1100, is contrary to the Judiciary Committee's clear statement that:

> "This bill would therefore authorize the addition of *only* those cases, *which the Justice Department stated would probably not be large in number, where the tribes have not been able to show that the amount in controversy exceeds $10,000,* and the government for some reason does not want to prosecute the case in behalf of the tribe." U.S.C.C. & A.N. 1966, p. 3147 (emphasis added). *See also, Scholder v. United States,* 428 F.2d 1123, 1125 (9th Cir. 1970), *cert. denied,* 400 U.S. 942.

For, while under 25 U.S.C. §175 the United States Attorney could conceivably bring almost any action on behalf of the Indians, whether or not it was grounded on a federal question, a close reading of the legislative history of §1362, *supra,* does not call for such a result where the Indians are suing on their own behalf. We are of the opinion that invocation of §1362 does not dispense with the requirement of properly pleading a federal question and that the *Oneida* case is dispositive of plaintiff's contentions in this regard.

The foregoing conclusions, however, are not completely dispositive of the jurisdictional issues in this case. For, unlike *Oneida,* where the Second Circuit dealt solely with claims in the nature of ejectment, here the plaintiff Band of Indians has additionally alleged the violation of various federal statutes by the defendant as giving rise to a right of recovery of certain water rights or their monetary equivalent. Specifically, plaintiff alleges that defendant and its predecessors in interest failed to perform the terms and conditions of §8 of the Act of January 12, 1891 (26 Stat. 712) necessary to validate the authority granted them by the Secretary of the Interior to construct, maintain or oper-

ate a flume line or system for the conveyance of water across the plaintiff's reservation. Section 8 provided that during the period the Indians remained on the land they were to "be supplied with sufficient quantity of water for irrigating and domestic purposes upon such terms as shall be prescribed in writing by the Secretary of the Interior."

It appears to the Court that the plaintiff's claim to relief with respect to the alleged deprivation of water rights can be properly pleaded only by reference to the particular statute in question, and further, that determination of plaintiff's right to recover, if any, necessarily turns on the interpretation of said federal law. *Cf. Marshall v. Desert Properties Co.*, 103 F.2d 551, 552 (9th Cir. 1939), *cert. denied*, 308 U.S. 563. In the absence of the statute in question, there appears to be no clear formula for asserting plaintiff's cause of action, since it does not find its basis in the "common law" of riparian or appropriative water rights, but rather is the unique child of federal law. Sondheim & Alexander, Federal Indian Water Rights: A Retrogression to Quasi-Riparianism? 34 So.Cal.L.Rev. 1, 1-5 (1960). Unlike an action for trespass or ejectment, which may be supported by general allegations of ownership or possession, wrongful entry or deprivation of possession, and resulting damages, an action for deprivation of federal Indian water rights is inextricably dependent upon the peculiar nature and scope of rights that may have been created by the particular treaty or statute involved. And such rights form the essential elements of the plaintiff's cause of action. *Cf. Walker v. Bank of America Trust and Savings Association*, 268 F.2d 16, 23 (9th Cir. 1959); *Beistline v. City of San Diego*, 256 F.2d 421, 425 (9th Cir.

1958); *Rosecrans v. William S. Lozier, Inc.,* 142 F.2d 118, 121-123 (8th Cir. 1944).

Turning back then to plaintiff's claims for trespass, it is deemed appropriate to include them in this lawsuit for judicial resolution under the principle of pendent jurisdiction. For plaintiff's federal and non-federal claims both "derive from a common nucleus of operative facts," and are such that the plaintiff "would ordinarily be expected to try them all in one judicial proceeding." *Mine Workers v. Gibbs,* 383 U.S. 715, 725 (1966). Judicial economy, convenience and fairness dictate that final disposition of all of plaintiff's claims be made in a single forum. *Id.* at 726.

II
THE UNITED STATES AS INDISPENSABLE PARTY UNDER RULE 19

We turn next to defendant's motion to dismiss the complaint based on plaintiff's failure to join the United States as an indispensable party under Rule 19, F.R.C.P. The Court is of the opinion that this issue is disposed of by the Ninth Circuit case of *Skokomish Indian Tribe v. France,* 269 F.2d 555 (1959). In that case the Indian tribe was suing for trespass and to quiet title of certain tide lands in the State of Washington. Defendants included several corporations and individuals, as well as the State of Washington. The trial court denied plaintiff's motion to join the United States as an additional party plaintiff, specifically adopting the reasoning of the Tenth Circuit in *Choctaw and Chickasaw Nations v. Seitz,* 193 F.2d 456 (1951), *cert. denied,* 343 U.S. 919 (1952). That Court, after noting that the Supreme Court had "clearly recognized the rights of restricted Indians, Indian tribes and pueblos

to maintain actions with respect to their lands, although the United States would not be bound by the judgment in such an action to which it was not a party," *id.* at 459, stated:

> "We find it difficult to believe that the Supreme Court, in recognizing the right of restricted Indians, Indian tribes and pueblos to maintain an action with respect to their lands, was dealing only with the capacity to maintain the action. Clearly, its language had reference to suits to which the United States was not a party. We cannot think the Supreme Court would have dealt so extensively with the mere capacity of the restricted Indians, the tribes, and pueblos to sue and defend in respect to their lands, if it regarded the United States as an indispensable party to the action. A holding that restricted Indians, tribes or pueblos have capacity to prosecute or defend an action with respect to their lands would be of no avail to them, if the United States is an indispensable party to such an action, since the joinder of the United States cannot be compelled. We think the inference must be drawn that the Supreme Court recognized the right of the restricted Indian, tribe, and pueblo to maintain such an action without the presence of the United States as a party." *Id.* at 459-460.

Further on, the Court in *Choctaw* discussed the contention of the corporate and individual defendants that if the Indians were allowed to prosecute their action without the United States as a party, a judgment in defendants' favor would not bind the United States,

thereby leaving defendants open to further claims from that sector. The Court replied:

> "If we hold that the United States is an indispensable party, the Nations will be unable to assert their long standing claim to the land; and if we hold that the United States is not an indispensable party, the defendants will run the risk of the burden and expense of defending two lawsuits, even though they succeed in obtaining judgment in their favor in the instant action.
>
> "We are of the opinion that the equities presented by the situation and the inconveniences that will result to the Nations, if they are denied the right to prosecute an action, and to the defendant, if the Nations are permitted to prosecute the action without the joinder of the United States, weigh heavily in favor of the Nations." 193 F.2d at 461. *See also Poafpybitty v. Skelly Oil,* 390 U.S. 365, 369-372 (1968).

Much the same considerations are involved in the instant suit. Defendant argues that it would be subject to multiple suits, since the United States would not be bound by a judgment in the present action in defendants' favor. Defendant also points out that the United States has never called into question the proper performance of the agreement under which the defendant and its predecessors in interest operated relative to their occupancy and use of the Capitan Grande Indian Reservation prior to 1934. It is argued that the United States was a party to that contract and somehow has an interest in preserving its validity and long standing interpretation.

Notwithstanding the potential prejudice to the defendant cited above, the Court is of the opinion that the real prejudice to the plaintiff that will arise from a dismissal due to plaintiff's inability to join an unconsenting United States as an indispensable party tips the scales of equity in plaintiff's favor. That the United States would suddenly become interested in a breach of contract action against the defendant after almost 40 years of inaction is a purely speculative possibility. In the meantime, there is nothing to prevent the defendant from asserting its proper compliance with the agreement in question as a defense to plaintiffs' action for trespass, even if the United States is not a party to the action.

III
STATUTES OF LIMITATIONS AND LACHES

A. Plaintiff's attack on the state statute of limitations, Cal. Code of Civil Procedure §338, to its claims for damages, is grounded on one or both of the following theories:

(1) That the Indians "stand in the shoes" of the United States and, therefore, should be afforded the benefits of the Federal Statutes of Limitations applicable to suits brought on behalf of the Indians by the United States, 28 U.S.C. §2415, or

(2) That the present suit is one to protect Indian trust property, which is an instrumentality of the United States, *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184, 1185 (9th Cir. 1971), and as such is entitled to be exempt from the application of state statute of limitations. In light of Justice Marshall's discussion concerning Indian sovereignty in

the recent decision of *McClanahan v. State Tax Commission of Arizona, ... U.S. ....*, 41 L.W. 4457, 4459 (No. 71-834, March 27, 1973), the Court passes over plaintiff's contention that Indian sovereignty alone might exempt it from state statutes of limitation with the comment that the argument is probably moot.

Plaintiff's first theory, in essence, is that if the United States were the plaintiff in this action, under 25 U.S.C. §175, it would not be subject to any state statute of limitation, state tort claims act or the doctrine of laches. The Court has already ruled, in Part I above, that 28 U.S.C. §1362 does not constitute a broad grant of federal jurisdiction to Indian tribes. The plaintiff contends, however, that the legislative history accompanying §1362 should somehow be read to expand another statute, 28 U.S.C. §2415, so as to make the limitation provisions contained in the latter applicable to plaintiff in lieu of the California state statute of limitations, which would admittedly bar plaintiff's remedies. We find such an interpretation unwarranted, where there has been no showing that both P.L. 89-505, 80 stat. 304, July 18, 1966, (28 U.S.C. §2415) and P.L. 89-635, 80 stat. 880, October 10, 1966 (28 U.S.C. §1362) were considered by Congress either simultaneously or in light of one another. Congress was clearly addressing different problems in the two statutes and therefore its comments in the one instance are not necessarily applicable in the other. Standing alone, §2415 applies only to the United States as a party plaintiff.

However, plaintiff's other authority in support of its contention that it should benefit from the provisions of §2415 is more persuasive. In *Agua Caliente Band of Mission Indians v. County of Riverside, supra,* the

plaintiff Indian band was contesting the imposition of the California Possessory Interest tax on the lessees of Indian land. The Court upheld the state tax on the ground that it did not purport to tax the land as such, but merely the full cash value of the lessee's interest in the land. Applying the rationale of *United States v. City of Detroit,* 366 U.S. 466 (1958), the Court found that, even though the state tax imposed a financial burden on a federal instrumentality (the Indian land), it could still be distinguished as a tax on the use of the land rather on the land itself, and was therefore valid.

In discussing whether 28 U.S.C. §1341 would apply to plaintiff's suit, and thus preclude the relief sought, the Court commented that:

> "An Indian, as the beneficial owner of lands held by the United States in trust, has a right acting independently of the United States to sue to protect his property interests. The reasons given in *United States v. Livingston, supra,* [179 F.Supp. 9 (E.D.S.C. 1959), affirmed without opinion, 364 U.S. 281 (1960)] for exempting instrumentalities of the United States from the operation of 28 U.S.C. §1341 are no less cogent when the right to the exemption is asserted by one who properly could be a co-plaintiff with United States." 442 F.2d at 1186.

In the instant case as well the plaintiff may sue to protect its property interests independently of the United States. And a fair reading of 28 U.S.C. §2415(b) indicates a clear Congressional intent to preserve the vitality of actions for trespass to Indian trust lands and conversion of Indian trust property where the plaintiff

is the United States. Applying the rationale of *Agua Caliente* the Court must therefore agree that since the interests sought to be protected by Congress are the same, no matter who the plaintiff may be, the benefits of §2415 should extend to the present plaintiff in this limited area involving redress for rights in Indian trust lands and property.

B. Plaintiff also admits to its failure to comply with the California Tort Claims Act, Cal. Govt. Code §810 *et seq.* which requires the submission of claims against public entities to those entities within a prescribed time. Nonetheless, plaintiff points out that 28 U.S.C. §1360(b) expressly withholds from the state the jurisdiction to "*adjudicate,* in probate proceedings or otherwise, the ownership or right to possession of [any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band or community that is held in trust by the United States] or any interest therein." (Emphasis supplied.)

In the Court's view, the cognizance of plaintiff's claims against the defendant would necessarily involve an adjudication of plaintiff's rights in the trust lands in question. And such a process is precluded by Congressional fiat. Thus, plaintiff cannot be compelled to pursue an empty remedy in a forum whose decisions as to plaintiff's rights would be a nullity.

C. The Court is admittedly concerned with the potential for prejudice that the long waiting period before suit may inflict on defendant's ability to maintain a proper defense to the action. However, in the Court's opinion, it is premature to rule on defendant's motion for dismissal due to laches, absent a clear showing that defendant's capacity for defending has been substantially impaired, thereby rendering further unconsent-

ed proceedings a manifest injustice. *See Point Landing, Inc. v. Alabama Dry Dock and Shipbuilding Co.*, 261 F.2d 861, 865-866 (5th Cir. 1958); *Gardner v. Panama Railway Co.*, 342 U.S. 29, 30 (1951). Also to be considered is plaintiff's alleged inability to seek judicial relief in the absence of free legal assistance. *Cf. Powell v. Zuckert*, 366 F.2d 634 (D.C. Cir. 1966); *Motto v. General Services Administration*, 322 F.Supp. 1218 (E.D.La. 1971). Therefore, the Court will reserve judgment on defendant's motion until such time as the facts are properly presented by way of motion for summary judgment or by trial on the merits. *Cf. Zaplicki v. The Hoegh Silvercloud*, 351 U.S. 525, 534 (1956).

IV
FAILURE TO STATE A CLAIM

The gist of defendant's next contention is that the plaintiff has not alleged a sufficient connection between it and its so called "predecessors in interest" who apparently committed the initial trespass and construction of the offending waterworks system. Therefore, argues Helix, the complaint is deficient and must be dismissed.

However, the liberal "notice pleading" rules that govern the construction of federal complaints are applicable here. *Cf. Conley v. Gibson*, 355 U.S. 41, 47 (1957). All that is required to survive a motion to dismiss under Rule 12(b), F.R.C.P., is to set forth " 'a short and plain statement of the claim,' that will give the defendant fair notice of what the plaintiff's claim is and the grounds on which it rests." *Id.* at 47. The Court's reading of the complaint here satisfies it that those minimum requirements have been fulfilled.

In Paragraph 20 of the complaint, plaintiff alleges that "HELIX has *assumed or succeeded to* any and all liabilities to the CAPITAN GRANDE BAND incurred by its predecessors in interest with respect to the construction, maintenance and operation of the above described water supply system." (Emphasis supplied.) Although this language may not delineate plaintiff's theory of relief with precision, it is settled that in lieu of summary dismissal the defendant is afforded the protection of "the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues." *Conley, supra,* 355 U.S. at 47-48. *See also Rennie & Laughlin, Inc. v. Chrysler Corporation,* 242 F.2d 208, 213 (9th Cir. 1957). See generally, Wright and Miller, Federal Practice and Procedure: Civil §1216. Exactly how the defendant is supposed to have assumed or succeeded to the liabilities of its predecessors in interest is a proper subject of discovery. It is enough to avoid a motion under Rule 12 (b)(6) that the plaintiff alleged that there has been such an assumption or succession to liability. Reading the allegations of the complaint in the light most favorable to the plaintiff, *De Witt v. Pail,* 366 F.2d 682 (9th Cir. 1966), the Court cannot say "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley, supra,* 355 U.S. at 45-46.

V

FAILURE TO ESTABLISH PLAINTIFF'S ATTORNEYS' AUTHORITY TO REPRESENT PLAINTIFF INDIAN BAND

Defendant's objection to the representation of plaintiff by California Indian Legal Services (hereinafter CILS) is based on the alleged lack of authority in CILS to speak for the plaintiff Band or to bind the plaintiff to any adverse judgment of this court. Defendant also claims that CILS has failed to comply with (1) the provisions of 25 U.S.C. §81, which imposes certain restrictions on contracts between Indians and non-Indians, and (2) with certain regulations of the Department of the Interior which require attorney contracts with Indians to be submitted to and passed on by the Department of the Interior. 25 C.F.R. §§72.1 *et seq.*

Plaintiff has appended to its brief the affidavit of Beverly Banegas, a member of Barona Group of the Capitan Grande Band of Mission Indians, in which she relates the steps taken by the Band to meet and agree upon the prosecution of this and similar litigation and to select counsel for that purpose. Also attached are the Resolution of the Band to appoint a committee to represent it in any litigation against the defendant and a further Resolution of said committee authorizing CILS to file this suit on behalf of the band. Defendant has failed to point out how the above described procedure fails if at all to bind the plaintiff Band to the judgments of this court.

Furthermore, defendant's contention that any agreement between the Band and CILS be invalid as not comporting with 25 U.S.C. §81 is significantly undermined by the opinion of the Solicitor of the Department of the Interior, by letter dated October 19, 1966, that 25 U.S.C. §§81-85 "apply only to contractual arrangements with Indians which contemplate that the other party will receive some material compensation or consideration." From its own reading of the applicable statutes and the regulations promulgated to effectuate them, the Court is inclined to agree that the above intepretation is correct and that the formalities referred to would not be required to validate the selection of CILS by the plaintiff Band in this case, since the arrangement between the two does not contemplate "the payment or delivery of any money or other thing of value," 25 U.S.C. §81, by the latter to the former.

VI
MOTIONS TO STRIKE AND FOR MORE DEFINITE STATEMENT

In view of the plaintiff's voluntary offer to amend its complaint in an effort to eliminate the errors and omissions objected to by the defendant's motions to strike and for a more definite statement, the Court will deny defendant's motions at this time without prejudice to its raising them again subsequent to the amendment.

Accordingly,

IT IS ORDERED that defendant's motions to dismiss the complaint for lack of subject matter jurisdiction, for failure to join an indispensable party, as barred by an applicable statute of limitations or the California Tort Claims Act, for failure to state a claim

upon which relief can be granted, and for failure to establish counsel's authority to represent plaintiff Band be and the same are hereby denied.

IT IS FURTHER ORDERED that the defendant's motions to strike and for a more definite statement be and the same are hereby denied without prejudice, subject to their being reinstated upon plaintiff's failure to properly amend the complaint.

IT IS FURTHER ORDERED that ruling on defendant's motion to dismiss the complaint on the ground of laches is hereby reserved pending further factual development of the issue in such proceedings as are agreeable to the parties or deemed appropriate by the Court.

IT IS FURTHER ORDERED that the question of the applicability of statutes of limitations to a trespass action brought by an Indian Band involves a controlling question of law, as to which there is substantial ground for difference of opinion, and an immediate appeal from this Order may materially advance the ultimate termination of this litigation.

Dated: Sept. 6, 1973.

Gordon Thompson, Jr.
GORDON THOMPSON, JR., Judge
United States District Court

Order Staying Issuance of Mandate.

United States Court of Appeals, for the Ninth Circuit.

Capitan Grande Band of Mission Indians, Plaintiff-Respondent, vs. Helix Irrigation District, Defendant-Appellant. No. 73-2956, D.C. No. 72-275.

Filed: April 7, 1975.

Upon application of Donald R. Lincoln, Esq. counsel for the Appellant, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41(a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Appellant herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before May 2, 1975.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

/s/ Joseph T. Sneed
Joseph T. Sneed
United States Circuit Judge.

Order.

In the United States Court of Appeals, for the Ninth Circuit.

Capitan Grande Band of Mission Indians, Appellees, v. Helix Irrigation District, Appellant. No. 73-2956.

Filed: April 29, 1975.

Motion of Appellant, Helix Water District, for Further Stay of Mandate pending petition for certiorari in the United States Supreme Court is hereby granted until June 2, 1975.

/s/ Joseph T. Sneed
U.S. Circuit Judge

28 U.S.C. § 1360.

28 U.S.C. § 1360 as amended provides:

(a) Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	Indian country affected
Alaska	All Indian country within the Territory.
California	All Indian country within the State.
Minnesota	All Indian country within the State, except the Red Lake Reservation.
Nebraska	All Indian country within the State.
Oregon	All Indian country within the State, except the Warm Springs Reservation.
Wisconsin	All Indian country within the State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States or is subject to a restriction against alienation

imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

Note: Alaska added August 8, 1958 by Pub. L. 85-615, 72 Stat. 545.

28 U.S.C. § 2415.

28 U.S.C. § 2415 as amended provides:

(a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later: *Provided,* That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment: [*Provided further,* That an action for money damages brought by the United States for or on behalf of a recognized tribe, band or group of American Indians shall not be barred unless the complaint is filed more than six years and ninety days after the right of action accrued:] *Provided further, That an action for money damages which accrued on the date of enactment of this Act in accordance with subsection (g) brought by the United States for or on behalf of a recognized tribe, band, or group of American Indians, or on behalf of an individual Indian whose land is held in trust or restricted status, shall not be barred unless the complaint is filed more than eleven years after the right of action accrued or more than two years after a final decision has been rendered in applicable adminis-*

trative proceedings required by contract or by law, whichever is later.

(b) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues: *Provided,* That an action to recover damages resulting from a trespass on lands of the United States; an action to recover damages resulting from fire to such lands; an action to recover for diversion of money paid under a grant program; and an action for conversion of property of the United States may be brought within six years after the right of action accrues [except that such actions for or on behalf of a recognized tribe, band or group of American Indians, including actions relating to allotted trust or restricted Indian lands, may be brought within six years and ninety days after the right of action accrues] *except that such actions for or on behalf of a recognized tribe, band, or group of American Indians, including actions relating to allotted trust or restricted Indian lands, or on behalf of an individual Indian whose land is held in trust or restricted status which accrued on the date of enactment of this Act in accordance with subsection (g) may be brought within eleven years after the right of action accrues.*

(c) Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.

(d) Subject to the provisions of section 2416 of this title and except as otherwise provided by Congress, every action for the recovery of money erroneously paid to or on behalf of any civilian employee of any agency of the United States or to or on behalf of any member or dependent of any member of the uniformed services of the United States, incident to the employment or services of such employee or member, shall be barred unless the complaint is filed within six years after the right of action accrues: *Provided,* That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment.

(e) In the event that any action to which this section applies is timely brought and is thereafter dismissed without prejudice, the action may be recommenced within one year after such dismissal, regardless of whether the action would otherwise then be barred by this section. In any action so recommenced the defendant shall not be barred from interposing any claim which would not have been barred in the original action.

(f) The provisions of this section shall not prevent the assertion, in an action against the United States or an officer or agency thereof, of any claim of the United States or an officer or agency thereof against an opposing party, a co-party, or a third party that arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. A claim of the United States or an officer or agency thereof that does not arise out of the transaction or occurrence that is the subject matter of the opposing party's claim may, if time-barred, be asserted only by way of offset and

may be allowed in an amount not to exceed the amount of the opposing party's recovery.

(g) Any right of action subject to the provisions of this section which accrued prior to the date of enactment of this Act shall, for purposes of this section, be deemed to have accrued on the date of enactment of this Act.

(h) Nothing in this Act shall apply to actions brought under the Internal Revenue Code or incidental to the collection of taxes imposed by the United States.

Note: Words in brackets added July 18, 1972 by Pub. L. 92-353, 86 Stat. 499; words in italics added October 13, 1972 by Pub. L. 92-485, 86 Stat. 803. Words underscored (Emphasis added).

Act of October 3, 1949.

The Act of October 5, 1949, 63 Stat. 705, provided in relevant part:

That on and after January 1, 1950, all lands located on the Agua Caliente Indian Reservation in the State of California, and the Indian residents thereof, shall be subject to the laws, civil and criminal, of the State of California, but nothing contained in this section shall be construed to authorize the alienation, encumbrance or taxation of the lands of the reservation, or rights of inheritance thereof, whether tribally or individually owned, so long as the title to such lands is held in trust by the United States, unless such alienation, encumbrance, or taxation is specifically authorized by the Congress.

Note: The above provisions were repealed in 1953 with the passage of 28 U.S.C. §1360.

25 U.S.C. § 233.

25 U.S.C. §233 provides:

> The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State: *Provided,* That the governing body of any recognized tribe of Indians in the State of New York shall have the right to declare, by appropriate enactment prior to September 13, 1952, those tribal laws and customs which they desire to preserve, which, on certification to the Secretary of the Interior by the governing body of such tribe shall be published in the Federal Register and thereafter shall govern in all civil cases involving reservation Indians when the subject matter of such tribal laws and customs is involved or at issue, but nothing herein contained shall be construed to prevent such courts from recognizing and giving effect to any tribal law or custom which may be proven to the satisfaction of such courts: *Provided further,* That nothing in this section shall be construed to require any such tribe or the members thereof to obtain fish and game licenses from the State of New York for the exercise of any hunting and fishing rights provided for such Indians under any agreement, treaty, or custom: *Provided further,* That nothing herein contained shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for

State or local purposes, nor as subjecting any such lands, or any Federal or State annuity in favor of Indians or Indian tribes, to execution on any judgment rendered in the State courts, except in the enforcement of a judgment in a suit by one tribal member against another in the matter of the use or possession of land: *And provided further,* That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York: *Provided further, That nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952.* (Act of Sept. 13, 1950, c. 845, § 1, 64 Stat. 845.) (Emphasis added.)